ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act	)	PP Docket No. 93-253
Competitive Bidding	)	
	)	
	)	

REPLY COMMENTS OF PRICE COMMUNICATIONS CELLULAR INC.

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November 30, 1993

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SUMMARY

Price Communications Cellular Inc. ("PCCI") supports the comments of JAJ Cellular and PacTel Corporation to the extent they assert that it would be unfair and contrary to the Congressional intent (as well as to established legal principles) to apply new rules regarding competitive bidding retroactively to the applications of the four parties who applied in 1988 and 1989 to provide cellular service in unserved areas of the Los Angeles Metropolitan Statistical Area ("MSA") and are the subject of the U.S. Court of Appeals decision in McElroy Electronics Corporation v. FCC. The Los Angeles unserved area applications should not be subject to competitive bidding, but rather should be awarded pursuant to a comparative hearing among those four applicants, consistent with the Commission's Rules and with the court's decision in McElroy. PCCI agrees with those commenters who support the Commission's proposal that, if the Commission determines to award cellular unserved area licenses by competitive bidding in any market, the pool of eligible applicants should be limited to those parties that filed applications prior to July 26, 1993. PCCI supports the comments of the Chief Counsel for Advocacy of the Small Business Administration with respect to the appropriate definition of "small business" for purposes of implementing the Communications Act provisions of the Omnibus Budget Reconciliation Act of 1993.

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To: The Commission

REPLY COMMENTS OF PRICE COMMUNICATIONS CELLULAR INC.

Price Communications Cellular Inc. ("PCCI"), by its counsel, hereby submits its reply comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding ("NPRM").[1] PCCI's reply comments relate primarily to the Commission's proposals for cellular unserved area applications. First, PCCI supports the comments of JAJ Cellular and PacTel Corporation to the extent they assert that it would be unfair and contrary to the Congressional intent (as well as to established legal principles) to apply new rules regarding competitive bidding retroactively to the applications of the four parties who applied in 1988 and 1989 to provide cellular service in unserved areas of the Los Angeles Metropolitan Statistical Area ("MSA") and are the subject of the U.S. Court of Appeals decision in McElroy Electronics Corporation

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[1] Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, FCC No. 93-455, PP Docket No. 93-253 (released Oct. 12, 1993).

v. FCC, 990 F.2d 1351 (D.C. Cir. 1993) ("McElroy"). The Los Angeles unserved area applications should not be subject to competitive bidding, but rather should be awarded pursuant to a comparative hearing among those four applicants, consistent with the Commission's Rules and with the court's decision in McElroy. Second, PCCI agrees with those commenters who support the Commission's proposal that, if the Commission determines to award cellular unserved area licenses by competitive bidding in any market, the pool of eligible applicants should be limited to those parties that filed applications prior to July 26, 1993. Third, PCCI supports the comments of the Chief Counsel for Advocacy of the Small Business Administration[2] with respect to the appropriate definition of "small business" for purposes of implementing the Communications Act provisions of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (the "Budget Act").

I. BACKGROUND

The McElroy proceeding stemmed from the Commission's decision to return applications filed by PCCI and three other parties -- Los Angeles SMSA Limited Partnership ("LASLP"), JAJ Cellular ("JAJ"), and McElroy Electronics Corporation ("McElroy") -- to provide cellular telephone service to the unserved areas within the Los

[2] Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Notice of Proposed Rulemaking (Nov. 10, 1993) ("SBA Comments").

Angeles MSA.[3] Each of these parties had filed applications between late 1988 and early 1989 based in part on the Commission's Second Report and Order, in which the Commission had adopted rules for filing cellular fill-in applications.[4] In the Second Report and Order, the Commission had limited to five years the exclusivity period for cellular licensees to expand their service areas and allowed parties desiring to serve unserved areas to file applications upon the expiration of the five-year period. The Commission returned the Los Angeles MSA applications as having been filed prematurely, based on its conclusion that: (1) the Commission had not yet established procedures for accepting, processing and selecting such applications; and (2) the applications were filed before the Commission had given notice of when the five-year fill-in period had expired or when such applications needed to be filed.

On appeal by LASLP, JAJ, McElroy, and PCCI, the Court of Appeals accepted the petitioners' assertion that their applications had not been filed prematurely, but instead had been filed in a manner consistent with the timetable that the Commission had established in the Second Report and Order. The court accordingly

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[3] Cellular Applications for Unserved Areas in MSAs/NECMAs, 4 FCC Rcd 3636 (C.C. Bur. 1989), recon. denied, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185 (1991).

[4] Amendment of the Commission's Rules for Rural Cellular Service ("Second Report and Order"), 2 FCC Rcd 2306 (1987), modified in part, Order on Reconsideration of Second Report and Order, 4 FCC Rcd 5377 (1989), petition for review dismissed sub nom. Amery Telephone Company et al. v. FCC, No. 89-1524 (D.C. Cir. 1989).

reversed the Commission's dismissal of the LASLP, McElroy, and JAJ applications, and remanded to the Commission with instructions to reinstate those applications nunc pro tunc. McElroy, 990 F.2d at 1367.

The court found that one additional issue was raised with respect to PCCI, since PCCI had filed its application for the Los Angeles MSA more than 60 days after the Commission had issued public notices informing the public of the mutual exclusivity of the LASLP, JAJ, and McElroy applications. PCCI asserted that its application should not be barred because the 60-day cut-off period applied only from the date of a public notice that a Los Angeles unserved area application had been "accepted for filing" and the Commission's public notice concerning McElroy's application had not given sufficient notice that the application had achieved this status. Rather than decide this issue, the court said that it would "leave it to the Commission to determine on remand the timeliness of [PCCI's] application", id. at 1364, and directed the Commission also to reinstate PCCI's application nunc pro tunc if the Commission found PCCI's application to be timely filed. Id. at 1367.[5]

[5] The background of the McElroy decision is also discussed in the Comments of JAJ Cellular at 1-2. The Commission has begun to address the issues raised in the McElroy decision. See Public Notice, Report No. CL-94-14 (Nov. 15, 1993).

II. DISCUSSION

A. Retroactive Application of Competitive Bidding to the McElroy Appellants' Los Angeles MSA Applications Would Be Unfair, Contrary to Congress's Intent, and Violate Established Legal Precedents; Rather, A Comparative Hearing Should be Used

In the NPRM, the Commission proposes to "auction, rather than lottery, unserved area applications filed prior to July 26, 1993" and seeks comment on this proposal. NPRM at ¶ 160. Consistent with Commission Rules, however, the Los Angeles MSA unserved area license should be awarded by comparative hearing rather than either auction or lottery.[6] PCCI agrees with the Comments of JAJ Cellular and PacTel Corporation that in any event, the applications for unserved areas of the Los Angeles MSA filed by the McElroy appellants (which PCCI has asserted should include PCCI's application as well as those of the other three appellants) should not be subject to retroactive competitive bidding. Rather, they should be evaluated based on the comparative hearing procedures in effect at the time those applications were filed in late 1988 and early 1989 (which are the same as the FCC's current procedures applicable to cellular licenses in the Top 30 markets). 47 C.F.R. §§ 22.32(e)(5), 22.916(a). (Although Section 22.33 allowed for the

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[6] In the context of this rulemaking proceeding, the Commission need only rule on whether the Los Angeles MSA unserved area applications are specifically excluded from the instant rulemaking. It need not resolve the question of whether the Los Angeles MSA unserved area applications should then be awarded by comparative hearing or lottery.

use of lotteries, that rule was, and still is, by its own terms limited to markets outside the Top 30 MSAs. 47 C.F.R. § 22.33(a).)

The Commission notes in the NPRM that in accordance with its rules, comparative hearings, as opposed to lotteries, have been used to select among mutually exclusive applications for cellular service in the Top 30 markets, while lotteries have been used in the remaining markets. NPRM at ¶ 34 n.21. Indeed, the Commission's Rules that were in effect when PCCI and the other Los Angeles MSA applicants filed their applications -- and that remain in effect -- require the Commission to use comparative hearings to issue cellular licenses for the Top 30 markets. See Reuters Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986). When the 1988/1989 Los Angeles applications were filed, nothing informed the applicants that the Commission might announce a decision to use auctions or lotteries to select the licensees for the unserved areas. It would be manifestly unfair for the Commission now to frustrate the applicants' legitimate expectations by changing the ground rules upon which they filed their applications. Moreover, application of new spectrum auction procedures would violate the McElroy court's indication that the Los Angeles MSA unserved area applicants must be treated as if their applications had not been erroneously returned in 1989. So as not to prejudice the applicants by reason of the passage of several years since the Commission erroneously returned the applications, the court required the Commission to consider carefully any prejudice to the Los Angeles applicants before imposing regulations that were not in effect in 1988 and

1989 when the applications were filed. 990 F.2d at 1364-66. The Los Angeles MSA applicants have expended considerable time, effort and resources in preparing, filing and prosecuting their applications. They have spent years rectifying the impermissible return of their applications. The instant general rulemaking proceeding is not the place for the Commission to perform the delicate balancing test required by the McElroy remand. The Commission should instead rule that the Los Angeles MSA unserved area applications do not fall within the ambit of the instant rulemaking and that they will be handled as part of the Commission's rulings responsive to the McElroy remand.

Changing the selection procedure to any procedure other than a comparative hearing for the Los Angeles MSA would also constitute impermissible retroactive rulemaking. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 897-98, 900 (D.C. Cir. 1992). In Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987), the Court of Appeals considered an appeal by a lottery loser of the Commission's post-filing change from a comparative hearing to a lottery procedure, with respect to unserved area applications filed prior to the conclusion of the initial cellular licensing period. In that case, the D.C. Circuit relied on three factors in upholding the Commis-sion's retroactive application of the lottery rules: (1) the lottery statute was in effect before the appellant filed its application; (2) the Commission had expressly warned all parties prior to the filing of their applications that it might,

after the filing, change from a comparative hearing to a lottery system; and (3) the change to a lottery procedure in fact made it less expensive for the appellant to prosecute its application. With respect to the Los Angeles MSA cellular unserved area applications, by contrast, none of those factors is present. When the 1988 and 1989 Los Angeles MSA unserved area applications were filed, there was no statutory authority to conduct auctions, and no notice by the Commission that auctions might be used. And, with particular reference to the Los Angeles MSA, conducting a comparative hearing among the four McElroy appellants will result in a much faster proceeding than an auction (because of the need to develop auction procedures and the likely lengthy court challenges to those procedures if they are applied to the Los Angeles applicants), with a resultant quickening of the time in which cellular service will be made available to the public in the unserved areas. Moreover, as is noted above, the applicable Commission Rules specified (and continue to specify) that comparative hearings are to be used to select cellular licenses for the Los Angeles MSA. Accordingly, applying the factors relied upon by the Maxcell court to the instant unserved area applications requires that auction rules not be applied retroactively to the Los Angeles applicants.

In addition, while the Budget Act restricted the Commission's ability to conduct lotteries to award licenses for services for

which subscribers paid compensation to the licensee,[7] it did not restrict the Commission's ability to conduct comparative hearings for those services.[8] And as the U.S. Court of Appeals recently recognized:

> "The comparative hearing process is unquestionably the standard method for the Commission to resolve mutually exclusive applications. As we have recognized, the 'basic teaching' of Ashbacker [Radio Corp. v. FCC, 326 U.S. 327 (1945)] is that 'comparative consideration ... is the process most likely to serve the public.' [Citation omitted.]

Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 450 (D.C. Cir. 1991).

B. If the Commission Awards Cellular Unserved Area Licenses for Any Markets by Competitive Bidding, the Pool of Eligible Applicants Should Be Limited to Those that had Filed Applications with the Commission Prior to July 26, 1993

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[7] The Budget Act generally prohibited the Commission, after the effective date of the Budget Act, from using a lottery to issue any license whose principal use (as determined by the Commission) would be to offer service in return for compensation from subscribers. Congress enacted a Special Rule, however (Pub. L. No. 103-66, § 6002(e)), permitting such lotteries where applications had been filed prior to July 26, 1993.

[8] The House Committee Report on the Budget Act concluded that in general, comparative hearings "frequently have been time consuming, causing technological progress and the delivery of services to suffer," and that lotteries "engendered rampant speculation; undermined the integrity of the FCC's licensing process and ... frequently resulted in unqualified persons winning an FCC license." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 248 (1993). With respect to the Los Angeles MSA applications, however, a comparative hearing will be much faster and more expeditious than an auction because of the virtual certainty of challenges to the auction rules, particularly with respect to the Los Angeles MSA unserved area applications which are governed by the McElroy remand discussed supra.

In the NPRM, the Commission has proposed to limit the opportunity to participate in any auction it may determine to hold for cellular unserved areas to "those applicants who filed prior to July 26, 1993," and requests comment on this proposal. NPRM at ¶ 160. PCCI supports the comments of Bell Atlantic Personal Communications Inc. and Cole, Raywid & Braverman to the extent that they support this Commission proposal. Applicants who filed before July 26, 1993, submitted applications in response to filing windows established by the Commission, which put the public on notice that applications not filed within those windows would not be considered. See Second Report and Order in CC Docket No. 90-6, 7 FCC Rcd 2449 (1992); Public Notice, Report No. CL-93-36 (December 23, 1992).[9] Furthermore, reopening the applicant pool would entail substantial delays. From the standpoint of fairness, administrative efficiency, and making competitive cellular service available to the public as expeditiously as possible, PCCI supports the Commission's proposal to limit the pool of applicants for any auction it may hold to those who filed applications before July 26, 1993, and with respect to Los Angeles, to the applications filed in 1988 and 1989.

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[9] PCCI has previously taken the position, which it continues to subscribe to, that the above Second Report and Order and Public Notice, Report No. CL-93-36 were invalid to the extent they solicited lottery applications for the Los Angeles MSA market, since, as is noted above, the Commission's Rules require that selections among cellular applications in the Los Angeles MSA market be determined by comparative hearing.

C. PCCI Supports the SBA Comments Regarding the Appropriate Definition of "Small Business" for Purposes of the Communications Act Provisions of the Budget Act

The Budget Act included, inter alia, the statutory objective of

> "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . ." Pub. L. No. 103-66, § 6002(a).

The Commission, in the NPRM, seeks comment on whether it should rely on the Small Business Administration's definition of "small business." NPRM at ¶ 77 and n.51. As clarified by the SBA Comments, the SBA's size standards, which were adopted to carry out the purposes of the Small Business Act, 15 U.S.C. § 632, are: (a) having a net worth (together with affiliated companies) of no more than $6 million or net income after federal taxes of $2 million; or (b) not exceeding a size standard (based on either revenue or the number of employees) for the industrial classification for the business in which the enterprise is primarily engaged (in the case of telecommunications services, the threshold is having fewer than 1,500 employees). SBA Comments at 8. The Commission, however, notes that questions have been raised as to whether the $6 million/$2 million standard is too low for telecommunications industries that may be capital-intensive. NPRM at ¶ 77 n.51.

In this regard, PCCI agrees with the SBA Comments that a more appropriate definition of "small business" for the award of

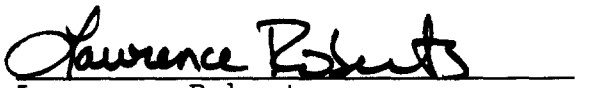
licenses in the telecommunications area is for a company, together with its affiliates, to have annual revenues of less than $40 million. SBA Comments at 10 (footnote omitted). PCCI believes that the $40 million standard is the lowest revenue figure that would strike an appropriate balance between serving the Congressional purpose of disseminating licenses among a wide variety of applicants and having the requisite ability to raise capital in the telecommunications industry.

III. CONCLUSION

For the reasons set forth above, Price Communications Cellular Inc. respectfully requests that the authorization for cellular unserved areas for the Los Angeles MSA be awarded by comparative hearing, consistent with the Commission's Rules; that in any event, the Commission exclude the Los Angeles MSA unserved area applications from the competitive bidding process; that if the Commission determines to award cellular unserved area licenses in any market by competitive bidding, the pool of eligible applicants be limited to those parties that had filed applications with the Commission prior to July 26, 1993 (and, for Los Angeles, to the applications filed by PCCI, JAJ, McElroy and LASLP); and that the Commission adopt the definition of "small business" set forth in the Comments of the Chief Counsel for Advocacy of the Small Business Administration.

Respectfully submitted,

PRICE COMMUNICATIONS CELLULAR INC.

By: 
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CERTIFICATE OF SERVICE

I, Patricia A. Druliner, a secretary in the law offices of Roberts & Eckard, P.C., do hereby certify that true copies of the foregoing "Reply Comments of Price Communications Cellular Inc." were sent this 30th day of November, 1993, by first-class United States Mail, postage prepaid, or as indicated by hand to the following:

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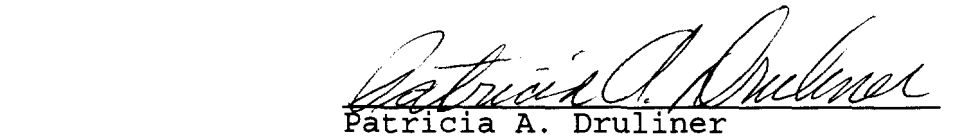
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